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No. 91-1195

In the

Supreme Court of the United States

October Term, 1991

BEIJING EVER BRIGHT INDUSTRIAL COMPANY,
Petitioner,

v.

TIMBER FALLING CONSULTANTS, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

While Beijing Ever Bright takes issue with the "facts" as presented by Respondent Timber Falling Consultants, Inc. in its Brief in Opposition, it is not necessary to respond point-by-point, since TFC's allegations do not diminish the presentation of the important issues before this Court. In reviewing the "record" to which TFC refers, moreover, the Court must keep in mind the fact that this "record" was produced in the context of a default

judgment.[1] It should suffice to say that, once Beijing Ever Bright was able to make an appearance in this litigation and contest TFC's claims, the district court found that Beijing Ever Bright has meritorious defenses. *See* Petition, App. B at B-9.

I. WHETHER THE AGGREGATE NATIONAL CONTACTS TEST VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IS AN IMPORTANT, UNRESOLVED ISSUE PROPERLY RAISED BELOW AND ADDRESSED BY THE COURT OF APPEALS

TFC's restatement of the first question presented virtually concedes that this case presents important questions:

> The issue, properly stated, is whether the personal jurisdiction provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, 1602 *et seq.*, ("FSIA"), violate the Due Process Clause of the Fifth Amendment.

TFC's Brief in Opposition To Petition For A Writ Of Certiorari ("Brief in Opposition") at i.

Beijing Ever Bright does not agree that this case necessarily involves a challenge to the constitutionality of the statute authorizing personal jurisdiction;[2] regardless of how the issue is stated, however, whether a district court may, consistent with the Due Process Clause of the

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[1]Contrary to TFC's assertion, Brief in Opposition at 1, n. 1, Beijing Ever Bright has challenged the propriety and sufficiency of the evidence presented by TFC at every step since it has appeared in this litigation. Also, as Beijing Ever Bright pointed out to the courts below, the only authority for many of the "facts" relied upon by TFC are the affidavits of *TFC's own attorneys*.

[2]*See* Petition For A Writ Of Certiorari at 15 n. 17.

Fifth Amendment, assert personal jurisdiction over an alien defendant based on aggregate national contacts is an important issue which this Court has twice noted but not yet had occasion to resolve.[3]

The importance of the national contacts issue is highlighted in other points made in TFC's brief. For instance, TFC correctly notes that in *Go-Video, Inc. v. Akai Elec.*, 885 F.2d 1406, 1413 (9th Cir. 1989), the Ninth Circuit expressly rejected the suggestion that this Court's decision in *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 702-03 (1982), removed the theoretical underpinnings of the national contacts test. *See* Brief in Opposition at 9, n. 10.[4] This only belies TFC's claim that there is no "split" among the circuits, since, as noted in the Petition, both the Fifth and Eleventh Circuits have noted an erosion of the national contacts test's rationale in light of *Ireland*. *See In Re Chase & Sanborn Corp.*, 835 F.2d 1341, 1344, n. 8 (11th Cir. 1988), *rev'd on other grounds sub nom., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Burstein v. State Bar of California*, 593 F.2d 511, 515-16 (5th Cir. 1982). Moreover, district courts in those circuits and elsewhere have followed those decisions and expressly rejected the national contacts test. *See* Petition at 18-19 and n. 23.

TFC's principal contention in opposition to certiorari thus is not that the national contacts issue is unimportant; rather it is a claim that the issue was not properly presented below. The record demonstrates otherwise.

In its motion for relief from the default judgment and in its opening brief to the court of appeals, Beijing Ever Bright argued that the appropriate analysis of minimum contacts for personal jurisdiction should be restricted to

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[3]Omni Capital Int'l v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 102, n. 5 (1987); Asahi Metal Industry Co. v. Superior Court of California, Solano County, 480 U.S. 102, 113, n.* (1987); *see* Petition at 14-15.

[4]*See also* Petition at 17-19.

contacts with the forum state (Oregon) in which the federal district court sits. Beijing Ever Bright's Memorandum In Support Of Motion For Relief From Judgment, August 2, 1990, ER 225; Brief of Appellant, November 6, 1990. In its opening brief to the court of appeals, Beijing Ever Bright explicitly argued that the FSIA cannot supercede the constitutional requirement of minimum contacts, and that if there is no jurisdiction over Beijing Ever Bright under the *traditional* minimum contacts analysis, then the FSIA cannot supply it. Brief of Appellant at 9-10. Indeed, TFC found the issue so important and adequately presented in the court of appeals that it devoted several pages of its appellee's brief to addressing the contention that "there is still some question between circuits as to whether the FSIA permits minimum contacts of the defendant to be aggregated for the entire United States." Appellee's Brief at 22-24, *quoting* Brief of Appellant at 10.

Both the district court and the court of appeals squarely addressed the question of the appropriate measure of contacts to support the assertion of personal jurisdiction. Because the court of appeals had earlier addressed the precise constitutional question here raised concerning the national contacts test, it was not necessary to reiterate those views in its opinion in this case. It did, however, both expressly follow and cite those earlier decisions in holding here that "the relevant area in delineating contacts is the entire United States, not merely [the forum state]." Petition, App. A at A–8, *quoting Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987), and *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *See also*, Opinion, October 15, 1990, (Petition, App. B at B-8) ("Ever Bright contends that even if the court finds that the FSIA applies to it, TFC cannot show that Ever Bright has the minimum contacts with the state of Oregon to permit this court to

exercise personal jurisdiction over it. Under the FSIA, personal jurisdiction may be exercised ...[based upon]... contacts with the United States as whole, not merely the forum state..."). TFC's contention that the constitutional issues concerning the national contacts test were neither raised nor decided below is thus simply, and demonstrably, wrong.[5]

II. THE COURT OF APPEALS' OVERLY NARROW ANALYSIS OF THE SERVICE OF PROCESS PROVISIONS OF THE FSIA PRESENTS AN IMPORTANT QUESTION AFFECTING THE VALIDITY AND EFFECT OF INTERNATIONAL AGREEMENTS

TFC apparently does not take issue with the point raised in the Petition that the decision of the court of appeals in this case affects numerous international agreements between the United States and other nations which contain, *inter alia*, provisions for service of process through diplomatic channels. *See, e.g.*, Petition, App. I. TFC also apparently concedes, as it must, that it *could have* effected service through the diplomatic channel established by the Consular Convention between the United States and The People's Republic of China, *see* Petition, App. F, which in turn would have led to proper service in accordance with Chinese law. *See* Waifa No. 47, Petition, App. G.

TFC raises two contentions to justify its resort to a service method that does not follow the Consular

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[5] Even if the court of appeals had not reached the constitutional issues surrounding the national contacts test, review by this Court would nevertheless be appropriate given the importance of the issue. This Court held in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-698 (1984), that, particularly in cases coming from federal courts, the Court may consider questions not specifically passed upon by courts below. *See also Carlson v. Green*, 446 U.S. 14, 17 n. 2 (1980) (same).

Convention and is an affront to Chinese law and sovereignty: (1) that the Consular Convention's provisions are not mandatory, and (2) that, as was noted by the court of appeals, the "focus" of the Convention is not exclusively on service of process. Brief in Opposition at 4.

These contentions are no more than red herrings. The restriction in the FSIA on resort to the alternative service methods of 28 U.S.C. § 1608(b)(3) provides that a party may not resort to service under that provision unless "service *cannot* be made under paragraphs (1) or (2)." (emphasis added). Whether or not the provisions of the Consular Convention "focus" on service of judicial documents,[6] or whether or not those provisions are "mandatory," is irrelevant so long as service *could* have been made using the Consular Convention. Indeed, by the terms of the FSIA itself, which the court of appeals seriously misapprehended in its ruling, the Consular Convention's service provisions become "mandatory" in any situation where there is no special arrangement between the parties for service, and no agent of the foreign agency or instrumentality authorized to accept service within the United States. *See* 28 U.S.C. § 1608(b)(1) and (2). The court of appeals' decision in this case effectively reads the limitations out of the FSIA's alternative service provision in section 1608(b)(3), and reads new limitations into the "applicable international convention" language of section 1608(b)(2), both with serious international repercussions. *See* Petition at 26-27.

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[6]While it is true that only one article of the Consular Convention deals directly with service of judicial documents, a number of other articles deal with similar and related judicial-assistance functions of consular officers, such as representation of nationals before courts and other authorities (Art. 24), and notarial functions (Art. 27). *See* Petition, App. F at F-7,8.

III. THE IMPORTANT INTERESTS AND DEMANDS OF INTERNATIONAL COMITY EMBODIED IN THE FSIA REQUIRE A REVIEW OF THE DISTRICT COURT'S AND THE COURT OF APPEALS' ANALYSIS OF "CULPABLE CONDUCT" AND RELIEF FROM THE DEFAULT JUDGMENT

TFC would have this Court view the issue of relief from the default judgment and the "culpable conduct" finding of the district court as merely a question of whether the district court abused its discretion. Brief in Opposition at 10. However, this case involves a foreign litigant -- an instrumentality of a foreign state -- subjected to a default judgment after attempted service of process that did not comply with the foreign state's domestic laws on service of judicial documents, and after receiving an instruction from its government that an appearance in a foreign court would be inappropriate in such circumstances.[7] As this Court noted in *Societe Nationale Industrielle Aerospatiale et al. v. U.S. District Court*, this Court has "long recognized the demands of comity in suits involving foreign states,..." 482 U.S. 522, 546 (1987).

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[7]Contrary to TFC's assertions, Brief in Opposition at 4, the cited record demonstrates that this instruction was much more than a "mere denial of an application" for an exit permit:

> I was advised by the Chinese Ministry of Foreign Affairs that the Ministry denied my application for an exit permit. The Ministry indicated that the denial was based on the reason that under Chinese law it was improper for a Chinese entity like Beijing Ever Bright to make an appearance in a foreign court if service of process made upon the Chinese entity was not made in accordance with (1) a Notice of the Supreme People's Court, Ministry of Foreign Affairs and the Ministry of Justice [Waifa No. 47], or (2) Article 29 of the Consular Treaty between the United States and the P.R.C.

ER 225, Liu Cert. ¶ 6. *See* Petition at 8.

> American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by the foreign state.

Id. at 546 (footnote omitted).

The "special problem" in this case of a default judgment against an FSIA defendant instructed by its government that a response would be inappropriate has arisen on other occasions, and it is apparent from this and the other cases that there is no consistent analysis by American courts on the issues of "culpable conduct" and the appropriateness of relief from the default judgment. *Compare, e.g., Jackson v. People's Republic of China,* 794 F.2d 1490 (11th Cir. 1986), *reh. en banc denied*, 801 F.2d 404, *cert. denied* , 480 U.S. 917 (1987), and *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, _ U.S. _, 110 S.Ct. 237 (1989) with *Meadows v. Dominican Republic,* 817 F.2d 517 (9th Cir.), *cert. denied,* 484 U.S. 976 (1987) and this case.

CONCLUSION

This case squarely presents important and unresolved issues involving the constitutional limits on federal court exercise of personal jurisdiction over foreign defendants and the obligations of federal courts to recognize the important interests and demands of international comity as embodied in the FSIA. The petition for a writ of certiorari should be granted.

Dated February 17, 1992

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